SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 735

THE BUSINESS DEVELOPMENT CORPORATION OF NORTH CAROLINA, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at —— F.2d ——, 26 AFTR 2d 70-5042 (the opinion is set out in full in Appendix, infra)

JURISDICTION

The judgment of the United States Court of Appeals was entered June 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the Court below applied the proper test as to what constitutes proof of reasonableness of a reserve for bad debts since its decision disregards factors which have been considered to be material by other federal appellate courts and is in conflict with the test applied by such courts.

II. Whether the Court properly and correctly construed the scope of the discretion vested in the Commissioner of Internal Revenue under the statute which provides for the deduction of a "reasonable" addition to a bad debt reserve, since the decisions of various federal courts are so inconsistent as to leave the intent and meaning of such statute in a state of confusion.

III. Whether the Court below, in deciding that the respondent's motion to set aside the jury's verdict in favor of the petitioner should have been granted, merely substituted its decision for that of the jury and thereby denied the petitioner of its right to trial by jury in violation of Amendment VII, United States Constitution.

IV. Whether the Court below, in approving the determination of the Commissioner of Internal Revenue that the petitioner was not entitled to deductions for additions made to its reserve for bad debts in 1963 and 1964, approved an exer-

cise of discretion by the Commissioner which results in a double standard for similarly situated taxpayers, in that the Commissioner grants federally chartered Small Business Investment Companies more favorable treatment than their state chartered counterparts.

V. Whether, in determining what constitutes the allowable addition to a reserve for bad debts for a taxpayer engaged in a new type of business with no actual past experience, the limitation of consideration to the past loss record of said business to the exclusion of other factors, results in a gross miscarriage of justice.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitutional provision involved is Amendment VII, which is as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The statutory provision involved is Section 166(c) of the Internal Revenue Code of 1954, and is as follows:

> "*Section 166. Bad Debts*
>
> . . . .
>
> (c) *Reserve for Bad Debts.* In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts."

STATEMENT OF THE CASE

The Business Development Corporation of North Carolina (hereinafter referred to as BDC), was incorporated in 1955 under special North Carolina enabling legislation. (R. 15)*. Its purpose was to stimulate economic development within North Carolina by providing a source from which parties who wished to start a new business or expand an existing business could borrow funds when they could not obtain financing from conventional sources. (R. 27-28). (Both the enabling legislation and BDC's Charter required that, as a prerequisite to obtaining a loan from BDC, a borrower had to first establish that he had been denied a loan by a conventional lending agency). (R. 17, 31).

When BDC was organized, the concept of a state business development corporation to promote economic development was new, the first such corporation having been organized in Maine about 1950. BDC was the first corporation of its type organized in the South. (R. 28-29, 51). From its organization to the end of the period herein involved it had operated only in a period of continuing prosperity. (R. 69, 101).

During the period beginning with its commencement of operations in April, 1956, and ending December 31, 1964, BDC made 145 loans in the total amount of $18,929,600, with the smallest loan being $2,000, the largest $500,000 and the average $175,000. Initially, BDC required the loans to be repaid within 10 years; however, the maximum repayment term was later extended to 15 years. (R. 57-58). When compared to commercial bank loans, BDC's loans were marginal, of substandard quality, and involved greater risk of loss. (R. 69, 109, 138). The term for repayment was longer than for

* Such references are to pages in the "Appendix".

similar loans by commercial banks; the borrowers were untried; and, in the event of a forced sale, the value of the collateral was questionable. (R. 69-70, 74, 100-101).

For its 1963 and 1964 taxable years BDC kept its books and filed its federal income tax returns on the accrual basis. (R. 15). It established a reserve to account for possible losses on its outstanding loans, and for the years from 1956 through 1962 made additions to its loss reserve account in the total amount of $318,387.58. It had no losses during this period, but had outstanding loans receivable totaling $8,490,336 at the end of 1962. (R. 17). During 1963 and 1964 BDC added the amounts of $95,000 and $120,000, respectively, to its loan loss reserve, sustained losses in the amounts of $28,037.72 and $23,015.66, respectively, which it charged to its loan loss reserve, and increased its outstanding loans so that it had outstanding loans receivable totaling $9,332,073 at the end of 1963 and $9,552,759 at the end of 1964. (R. 17). The amounts added in 1963 and 1964 were considered by members of BDC's executive committee to be reasonable additions to its loan loss reserve (R. 72-76, 99-101, 118-121, 138-139).

The enabling legislation pursuant to which BDC was established provides that its affairs shall be subject to examination by the Commissioner of Banks of North Carolina, and such examinations have been made about once every two years. (R. 106). In the examination reports the Commissioner of Banks constantly reminded BDC that sufficient reserves should be set up to take care of potential losses which, in his judgment, would be several times greater than those of commercial banks under similar circumstances. (R. 111-112). The Commissioner's staff generally felt that BDC's loss reserve should not be less than 10% of its total outstanding loans. (R. 111).

After the addition to its loan loss reserve of $95,000 in 1963 and $120,000 in 1964, the reserve at the end of each year was between 4% and 5% of the amount of BDC's total outstanding loans. (R. 19). If no amount had been added to the reserve in either of said years, the balance in the reserve account at the end of 1963 would have been 3.1% of its total outstanding loans and at the end of 1964 would have been 2.8% of its total outstanding loans. (R. 60-61).

On its federal income tax returns for 1963 and 1964 BDC claimed deductions for the amounts of $95,000 and $120,000, respectively, which it added to its loan loss reserve in such years. (R. 17).

The Commissioner of Internal Revenue disallowed in full the deductions claimed by BDC for additions to its loan loss reserve in 1963 and 1964 (R. 16). As a result, deficiencies and interest were assessed against and paid by BDC. (R. 16). Claims for refund were timely filed and disallowed. (R. 16-17).

Suit was subsequently instituted to recover the amounts claimed; and, after the presentation of evidence was concluded, the matter was submitted to a jury, which answered four special interrogatories. (R. 152-153). Upon the basis of the jury verdict judgment was entered in BDC's favor in the total principal amount of $128,303.67, plus interest. (R. 38-39). Thereafter, the Respondent made a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (R. 40-41). The District Court denied such motion and the Respondent appealed to the United States Court of Appeals for the Fourth Circuit. (R. 42-43). The Court of Appeals reversed the District Court and ordered judgment to be entered for the Respondent. (Appendix, 4a, infra).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. IN MAKING ITS DETERMINATION AS TO WHAT CONSTITUTES PROOF OF REASONABLENESS OF A RESERVE FOR BAD DEBTS, THE COURT BELOW EMPLOYED AN IMPROPER STANDARD BY REFUSING TO TAKE INTO CONSIDERATION FACTORS WHICH HAVE BEEN HELD BY OTHER FEDERAL APPELLATE COURTS TO BE PROPER FOR CONSIDERATION IN MAKING SUCH A DETERMINATION, AND ITS DECISION IS IN CONFLICT WITH ANOTHER FEDERAL APPELLATE COURT.

(a) Factors Proper for Consideration in Determining What Constitutes Proof of Reasonableness.

The standard test for computing a reasonable addition to the bad debt reserve, cited by many courts, is set out in *Merten's Law of Federal Income Taxation*, Section 30.73. (Zimet and Ness Revision, 1969), and is as follows:

> "What is a reasonable addition to a bad debt reserve depends upon the nature of the business, general business conditions, past experience in collecting accounts and bad debts, the amount of the existing reserve, and other material factors."

In the present case, the court below relied solely upon the past actual loss experience of the petitioner in holding that its reserves were adequate without the additions herein involved. (Appendix 7a). It cited *Smoot Sand & Gravel Corp.* v. *Commissioner*, 274 F.2d 495 (4th Cir. 1960), to the effect that the purpose of the reserve is to charge the loss against the period in which it was actually incurred. It then stated that since the losses experienced to the end of 1964 were only $51,053.38 it was evident that the reserve existing at the beginning of 1963 was "generously adequate" without the 1963 and 1964 additions. (Appendix 7a). What the court did not consider was that losses which BDC might incur ten or

fifteen years later could relate to loans outstanding during 1963 or 1964.

The Fifth Circuit has stated that a reasonable addition to a reserve for bad debts is that amount necessary to bring the balance in the reserve to an amount which can be reasonably expected to cover anticipated losses with respect to debts outstanding at the end of the year. *Dixie Furniture Company* v. *Commissioner*, 390 F.2d 139 (5th Cir. 1968). The Ninth Circuit has held that evidence of reasonableness includes testimony relative to "the substantial risk incurred by a mortgagee who requires only a small down payment, a possible dip in the economy, a possible change in the neighborhood which would cause a decline in property values, expenses incident to foreclosure, the likelihood that a purchaser with small equity will fail to maintain the property and the slender market value, if any, of collateral share accounts during the early years of the loans which they secure." *Bolling* v. *Commissioner*, 357 F.2d 3, 10 (8th Cir. 1966). BDC presented testimony relative to similar matters as they related to its situation, all of which the jury heard and weighed in making its decision. These factors were disregarded by the court below, for its decision was in effect that there was no evidence which, as a matter of law, could support a jury verdict. As a result, it failed to apply the proper standard in making its determination.

The application of an improper standard in reviewing evidence and in examining the judgment rendered on the jury's verdict constitutes a proper basis for certiorari. *Scutilles* v. *Inter-Caribbean Shipping Corporation*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2. 142 (1959).

(b) Conflict Between Circuits.

The First Circuit, in *Rhode Island Hospital Trust Co.* v. *Commissioner*, 29 F.2d 339 (1st Cir. 1928), considered a case in which the taxpayer made additions to its reserve for bad debts and the Board of Tax Appeals refused to allow such additions to said reserve for the reason that:

> "The evidence adduced shows that in setting up its reserve for bad debts and in making additions thereto the petitioner apparently resorted to guesswork. There is no evidence with respect to its experience as to losses over a period of years, upon which a reasonable reserve might be predicated." 8 B.T.A. 555 at 559

On appeal, the First Circuit held that such a ruling could not be sustained. It then reviewed the evidence presented by the taxpayer's witnesses, primarily its president, as to why the bank's officials believed such additions to be necessary, and held as follows:

> "The stated grounds for the action of the executive officials of this bank in increasing their reserve for bad debts—and thus decreasing the showing of profits applicable to dividends—is highly persuasive, if not entirely conclusive. To characterize this clear and cogent statement of the grounds on which experienced bankers limited their profits in the interest of safety, as 'guesswork', because reasonably anticipated losses were not ascertainable by mathematical calculation, is a position which this court declines to adopt. There is in this record no atmosphere of tax-dodging. While the honest judgment of bank officials as to the amount of profits made does not appear to be expressly made by statute prima facie evidence for profits-tax purposes, it is certainly, in the absence of any indication of a tax-dodging intent, to be given very substantial, if not controlling, weight. Plainly, such conservative action by

officials, having obviously fully adequate motives to regard loans made by themselves as good, should not be lightly overruled by any governmental authorities. To hold, as the Board of Tax Appeals apparently did hold, that the evidence did not warrant the Commissioner in exercising discretion favorable to the bank's claim, because there was 'no evidence with respect to its experience as to losses over a period of years upon which a reasonable reserve might be predicated,' was, as matter of law, wrong." 29 F.2d at 342

The action taken by the Fourth Circuit in the present case coincides exactly with the position taken by the Board of Tax Appeals in *Rhode Island Hospital Trust Co.*, and is therefore directly in conflict with the decision of the First Circuit, which reversed the Board of Tax Appeals.

II. THE COURT BELOW COULD NOT HAVE PROPERLY AND CORRECTLY CONSTRUED THE SCOPE OF THE COMMISSIONER'S DISCRETION IN DETERMINING WHAT CONSTITUTES A "REASONABLE" ADDITION TO A BAD DEBT RESERVE BECAUSE THE COURT DECISIONS CONSTRUING § 166(c), INTERNAL REVENUE CODE, ARE SO DIVERSE AS TO RENDER THE STATUTE MEANINGLESS.

Aside from stating that the addition to a bad debt reserve account must be "reasonable" and for a few generalized comments on "reasonableness" (at § 1.166-4(b) of the Commissioner's Regulations [1]), neither

[1] This Section of the Regulations provides as follows:

"(b) Reasonableness of addition to reserve.—(1) Relevant factors.—What constitutes a reasonable addition to a reserve for bad debts shall be determined in the light of the facts existing at the close of the taxable year of the proposed addition. The reasonableness of the addition will vary as between classes of business and with conditions of business prosperity. It will depend primarily upon the total amount of debts outstanding as of the close of the taxable year, including those arising currently as well as those arising in prior years, and the total amount of the existing reserve."

the Internal Revenue Code nor the Regulations thereunder provide much in the way of useful information on just what is reasonable. This has left the Internal Revenue Service free to inject its own formulae for determining reasonableness; and, in addition to the fact that such formulae have varied from case to case throughout the years, the court rulings on whether or not the bad debt reserves of particular taxpayers were reasonable have been inconsistent to the point of creating chaos in the area.

For example, the Tax Court in *Industrial Credit Co., Inc.*, T.C. Memo. Dec. 1967-75, P-H TC Memo ¶ 67,075 (1967), found as reasonable the bad debt reserves claimed by the petitioner therein based upon the facts that said petitioner was engaged in a high risk financing business, it had not had sufficient time in which to develop a history of actual bad debts, it had operated only in a healthy economy with a high level business cycle, and comparable lending institutions having less risk are allowed a larger percentage than said petitioner claimed. However, the same court, in *Commercial Capital Corporation*, T.C. Memo. Dec. 1968-186, P-H TC Memo ¶ 68,186 (1968), upheld the Commissioner of Internal Revenue when he relied upon the sole factor of the taxpayer's bad debt history in disallowing a deduction for additions to its reserve for bad debts. The Tax Court again allowed the Commissioner to prevail in *Massachusetts Business Development Corp.*, 52 T.C. 946 (1969) when he relied primarily on that taxpayer's past loss history, even when that taxpayer was engaged in high risk financing and had been in business only a short time. In addition, the factor of economic prosperity and possible future depression was specifically excluded from con-

sideration because, said the court, to permit an accumulation for this reason constituted nothing more than a "contingency reserve against excessive losses in possible future depression years—a type of reserve that might be justified by sound business reasons but not one that is within the contemplation of section 166(c)." 52 T.C. at 955. Support for this theory was found in such cases as *American State Bank* v. *United States*, 279 F.2d 585 (7th Cir. 1960) and *S. W. Coe & Co.* v. *Dallman*, 216 F.2d 566 (7th Cir. 1954).

Opposing the view that the establishment of a reserve for future contingencies is not deductible (in addition to *Industrial Credit Co., Inc.*, supra) are *Mitchell-Huron Production Credit Association* v. *Welsh*, 163 F.Supp. 883 (D.S.D. 1958), *Bolling* v. *Commissioner*, supra, *Rhode Island Hospital Trust Company* v. *Commissioner*, supra, and *Union National Bank of Youngstown* v. *United States*, 237 F.Supp. 753 (N.D. Ohio 1965). In the latter case the Court stated:

> "The Commissioner has long been impressed with his caveat against the establishment of 'mere contingency' reserves, and, therefore, the thrust of his reasoning is diverted from a fundamental principal of taxation—that of providing, as far as possible, equal standards or measures for all who are similarly situated— . . .
>
> "The real question is not whether a fund for contingencies shall be allowed—all of these reserves contain contingency factors—but, the question must be whether the contingency factor shall be required to be uniform, i.e., measured with the same ruler." 273 F.Supp. at 763.

And, opposing the view that the use of a taxpayer's bad debt history as the sole basis for upholding a deter-

mination by the Commissioner (in addition to *Industrial Credit Co., Inc.*, supra) is *First Trust and Savings Bank of Davenport, Iowa* v. *United States*, 23 AFTR 2d 69-971 (S.D. Iowa, 1969), where the court held that the fact that there had been in the past no losses with respect to the loans for which the reserve had been established did not justify the conclusion that there was no reasonable risk of loss, or that such losses may not be reasonably anticipated to occur in the future in the ordinary course of the taxpayer's business. See also on remand to the Tax Court, *Glen L. Bolling*, T. C. Memo. Dec. 1966-216, P-H TC Memo ¶ 66,216.

Further, there is great diversity in the weight to be given testimony of individuals as to what would be a reasonable reserve for bad debts. This varies from "very substantial, if not controlling weight" in *Rhode Island Hospital Trust Company* v. *Commissioner*, supra, to "weight" in *Industrial Credit Co., Inc.*, supra, to such little weight that it did not rise to that level of proof which would show an abuse of discretion on the part of the Commissioner, *Patterson* v. *Pizitz, Inc.*, 353 F.2d 267 (5th Cir. 1965).

Likewise, the question of what constitutes a proper exercise of discretion by the Commissioner has varied from *Black Motor Co.*, 41 B.T.A. 300 (1940), Affd. 125 F.2d 977 (6th Cir. 1942), where such discretion was held to be properly exercised in the absence of a conclusive showing by the taxpayer that the Commissioner's computation was not reasonable, to *Industrial Credit Co., Inc.*, supra, where the submission of evidence attesting to the hazardous nature of the taxpayer's business was sufficient justification for the court to hold that the Commissioner's action in disallowing additions to bad debt reserves was arbitrary.

The result of such diverse and inconsistent authorities has been to confuse and cloud the true meaning and intent of Section 166(c), Internal Revenue Code, and has the ultimate effect of permitting a court to arbitrarily select the result it wishes to reach in a particular case and then substantiate such result by citing the authorities which support its decision while simply ignoring those cases not consistent therewith.

III. THE COURT BELOW, IN DECIDING THAT THE RESPONDENT'S MOTION TO SET ASIDE THE JURY'S VERDICT IN FAVOR OF THE PETITIONER SHOULD HAVE BEEN GRANTED MERELY SUBSTITUTED ITS DECISION FOR THAT OF THE JURY AND THEREBY DENIED THE PETITIONER OF ITS RIGHT TO TRIAL BY JURY IN VIOLATION OF AMENDMENT VII, UNITED STATES CONSTITUTION.

The Seventh Amendment prohibits re-examination, by any Court of the United States, of any fact tried by a jury except in accordance with the rules of the common law; and an appellate court cannot substitute its judgment for that of the jury. *Smith* v. *Illinois Central Railroad Company*, 394 F.2d 254 (6th Cir. 1968). The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury, *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); and a jury verdict should never be pre-emped by the court unless it has no basis in fact. *Compton* v. *United States*, 377 F.2d 408 (8th Cir. 1967).

A motion to set aside the jury's verdict cannot be granted unless "*as a matter of law*, the opponent of the movant failed to make a case, and, therefore, a verdict in movant's favor should have been directed," *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, at 251, 61 S.Ct. 189 at 194, 85 L.Ed. 147 at —— (1940). (Italics added). In addition, the evidence must be con-

sidered in the light most favorable to the party against whom the motion is directed; and every conclusion or inference that can be legitimately drawn therefrom in its behalf must be drawn. *Burcham* v. *J. P. Stevens & Co., Inc.*, 209 F.2d 35 (4th Cir. 1954).

The court below held that it was its duty to withdraw the present case from the jury because the necessary inference was so tenuous that it rested merely upon speculation and conjecture. (Appendix 7a).

The witnesses for BDC included its Executive Vice President, three members of its Executive Committee, the Executive Vice President of the Business Development Corporation of New York, the Executive Vice President of RDIC Development Corporation (Pennsylvania's equivalent of a business development corporation), the Commissioner of Banks of the State of North Carolina, and a member of BDC's Board of Directors who was also a former governor of North Carolina and former Secretary of Commerce of the United States.

The evidence presented by these witnesses established prima facie that BDC's loans were risky and speculative; that its average loan was substantial in amount; that all of its loans were repayable on a long-term basis (10 to 15 years); that it was engaged in a new type of business and was one of the first of its type to commence operations; that up to the end of the last taxable year in controversy it had operated in an ascending economy and under good business conditions; that as of the end of each year in controversy and after the additions to its reserve, the amount of the taxpayer's reserve, was between two to two and one-half times the amount of its average outstanding loan; that

if no addition had been made to the reserve, the amount of the taxpayer's reserve at the end of each year in controversy would have been less than twice the amount of its average outstanding loan; that as of the end of each year in controversy the taxpayer had not operated through one complete cycle of its loans; that during each year in controversy the taxpayer incurred a substantial loss by reason of a defaulted loan or loans; and that its directors (all of whom were prominent businessmen who served without compensation as a public service), the Commissioner of Banks, and officials of corporations engaged in the same type of business in other states considered its reserve (including the additions) to be reasonable and the reserve, as allowed by the Commissioner, to be too low and inadequate.

While it is true that only one witness testified as to specific loans, that would be sufficient to warrant submitting the case to the jury, inasmuch as it does present some evidence for the petitioner. However, the individuals concerned with the establishment of BDC's reserves for the years in question were experienced bankers and businessmen, and they gave sound testimony as to their reasons for establishing the reserve at the level set forth above.

In light of the evidence presented and the calibre of BDC's witnesses, for the Fourth Circuit to say that there was "no substantial evidence to support" the jury's verdict and that the inferences raised thereby were "so tenuous as to rest merely upon speculation and conjecture" is tantamount to depriving BDC of its constitutional right to a jury trial. Such result is made all the more obvious by the Court's utter disregard of precedents laid down with respect to the weight

to be given to such testimony in *Rhode Island Hospital Trust Company* v. *Commissioner,* supra; *Bolling* v. *Commissioner,* supra; and *Industrial Credit Co., Inc.;* supra.

IV. THE COURT BELOW, IN APPROVING THE DETERMINATION OF THE COMMISSIONER OF INTERNAL REVENUE THAT THE PETITIONER WAS NOT ENTITLED TO DEDUCTIONS FOR THE ADDITIONS MADE TO ITS RESERVE FOR BAD DEBTS IN 1963 AND 1964, APPROVED AN EXERCISE OF DISCRETION BY THE COMMISSIONER WHICH RESULTS IN A DOUBLE STANDARD FOR SIMILARLY SITUATED TAXPAYERS.

The applicable statute, Section 166(c), Internal Revenue Code, authorizes the Commissioner of Internal Revenue to exercise his discretion in determining the reasonableness of an amount added to a reserve for bad debts. In certain instances he has exercised this discretion by the issuance of Revenue Rulings establishing guidelines as to what constitutes a reasonable reserve for bad debts in a particular industry.

For example in Revenue Ruling 65-92, 1956-1 C.B. 112, he approved the utilization by commercial banks of a uniform reserve ratio of 2.4% of outstanding loans as a reasonable reserve. For years prior to the issuance of this Ruling, banks were authorized by Mimeograph 6209, 1947-2 C.B. 26, as supplemented by Revenue Ruling 54-148, 1954-1 C.B. 60, to establish a reserve for bad debts based upon an average experience ratio compiled over any 20 consecutive years after 1927, which period could be so constructed as to include the 1929-1930 depression period.

Another example of the Commissioner's exercise of discretion by the establishment of guidelines is found in Revenue Ruling 64-48, 1964-1 (Part 1) C.B. 104,

as clarified by Revenue Ruling 65-88, 1965-1 C.B. 112, where he authorized Small Business Investment Corporations (SBIC's) to establish a reserve for bad debts equal to 10% of their outstanding loans receivable. This Ruling was based upon the premise that SBIC's constitute a new industry and have only been in existence since 1959, an insufficient number of years to compile an adequate loss experience. It does provide that after a particular SBIC has been in existence for more than ten years it must use its own experience in making additions to its reserve for bad debts; however, it may maintain a reserve equal to 10% of its outstanding accounts receivable for the first ten years of its existence.

Although SBIC's are federally chartered organizations, they serve the same function as the state chartered business development corporations and are quite similar in nature and operation. However, the Commissioner has refused to apply Revenue Ruling 64-48 (as clarified by Revenue Ruling 65-88) to them or issue a similar ruling which would apply to business development companies. Instead he has attacked as unreasonable the additions made to BDC's reserve for bad debts during the seventh and eighth years of its existence in amounts sufficient to maintain such reserves at between 4% and 5% of its outstanding loans receivable at the end of each of such years.

There is no justification whatsoever for applying a less favorable standard to state chartered business development corporations than that applicable to federally chartered SBIC's. This unequal treatment constitutes arbitrariness *per se* by the Commissioner and results in discrimination against the petitioner herein. *Union National Bank of Youngstown* v. *United States*,

supra. See also *Industrial Credit Co., Inc.*, supra, where the Tax Court spoke to this precise point:

> "Thus, with one hand, the Commissioner has recognized the inherent risk to Intermountain Capital [a SBIC] and allowed it a 10 percent reserve for bad debts until it has a 10 year loss experience and with the other hand, he has refused to recognize the same risk facing the petitioner, which is engaged in the same type of business as Intermountain Capital. We think the difference in treatment is not justified". P-H TC Memo ¶ 67,075 at page 418.

V. IN DETERMINING WHAT CONSTITUTES A REASONABLE ADDITION TO THE RESERVE FOR BAD DEBTS OF A TAXPAYER ENGAGED IN A NEW TYPE OF BUSINESS WITH NO ACTUAL PAST EXPERIENCE, THE LIMITATION OF CONSIDERATION TO THE PAST LOSS RECORD OF SAID BUSINESS TO THE EXCLUSION OF OTHER FACTORS, RESULTS IN A GROSS MISCARRIAGE OF JUSTICE.

The case of *Black Motor Co.*, 41 B.T.A. 300 (1940), affd. 125 F.2d 977 (6th Cir. 1942), is the case to which many courts have turned for direction in determining whether or not bad debt reserves were reasonable. The formula approved by that case consisted of obtaining a six year ratio of average net charge-offs to outstanding receivables at year end and then applying such ratio to the outstanding receivables at the end of the year being examined. It was upon this formula that the Revenue Agent auditing BDC's books and records, and consequently the Commissioner of Internal Revenue, relied on making his determination that the additions to its reserve for bad debts were excessive and unreasonable; and the ultimate determination by the court below that the Commissioner's action was not shown to be arbitrary resulted in the approval of the use of said formula in the present case.

However, the formula approved in *Black Motor Co.* takes into consideration only past events to the exclusion of what may occur in the future. Moreover, the formula presumes that (1) the taxpayer has been in operation long enough to establish a reasonable experience factor and (2) the taxpayer's losses occur on receivables created primarily in the same year in which the loss occurs; neither of which is the situation in the present case.

Therefore, the strict reliance upon such a formula has resulted in a gross miscarriage of justice by denying BDC the right to have its case decided upon the basis of rules of law which apply to its factual situation.

Here, BDC, engaged in a new type of business, had been in operation for only a few years, had made relatively few large speculative long-term loans, and had not been in existence for one complete cycle of its loans. How, then can the same formula be applied as was applied to a taxpayer which acquired trade receivables in the ordinary course of its business and which had operated for a period sufficient to establish a meaningful loss experience?

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

N. A. Townsend, Jr.
Attorney for Petitioner

APPENDIX

(1) District Court's Judgment.

[Caption Omitted]

THIS CAUSE HAVING COME ON FOR TRIAL before the Court and a jury on May 22, 1969, both parties appearing by counsel and the Court having instructed the jury to find a special verdict based upon certain interrogatories and the jury having rendered its special verdict; and the amount of the recovery decreed herein, if any, has been agreed to by the parties.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that for the taxable year 1963, the plaintiff, The Business Development Corporation of North Carolina, recover from the defendant the amount of $49,400.00 in federal income tax, with interest at six per cent per annum from September 18, 1967, and statutory interest in the amount of $10,164.22, with interest at six per cent per annum from September 18, 1967.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that for the taxable year 1964, the plaintiff, The Business Development Corporation of North Caroline, recover from the defendant the amount of $60,000.00 in federal income tax, with interest at six per cent per annum from September 18, 1967, and statutory interest in the amount of $8,739.45, with interest at six per sent per annum from September 18, 1967.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this action shall be taxed to the defendant.

Dated this 9th day of June, 1969.

/s/ RICHARD B. KELLAM
Richard B. Kellam
Judge,
United States District Court

(2) Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

[Caption Omitted]

The defendant, United States of America, by and through its attorney, Robert H. Cowen, United States Attorney for the Eastern District of North Carolina, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, moves the Court to enter judgment in favor of defendant notwithstanding the verdict, or, in the alternative, to grant defendant a new trial.

As grounds for its motion for judgment notwithstanding the verdict, the defendant states:

1. That the defendant is entitled to judgment as a matter of law because plaintiff failed to prove that the Commissioner of Internal Revenue abused his discretion in not allowing an addition to its bad debt reserve in each of the years 1963 and 1964.

2. That this Court erred in not granting defendant's motion for a directed verdict at the close of all the evidence. The evidence and the inferences to be drawn therefrom at that time were such that reasonable men could not differ as to the conclusions to be drawn.

As grounds for its alternative motion for a new trial, the defendant states:

1. That the Court erred in admitting the deposition of Luther H. Hodges, or, in the alternative, the Court erred in admitting opinion testimony of Luther H. Hodges and erred in failing to strike his testimony regarding reserves for losses allowed other financial institutions.

2. That the Court erred in allowing H. Powell Jenkins to testify that a consideration of reserves allowed other financial institutions entered the plaintiff's reasoning as to the adequacy of its own reserves;

3. That the Court erred in allowing H. Powell Jenkins to testify as to categories of problem loans on which plaintiff had sustained no loss;

4. That the Court erred in allowing the testimony and opinion of David J. Duggan;

5. That the Court erred in allowing the testimony and opinion of David R. Clifford;

6. That the Court erred in charging the jury that "the fact that there has been in the past no substantial losses in respect to the plaintiff's loans does not require the conclusion that there is no reasonable risk of loss, or that such losses may not be reasonably anticipated to occur in the future in the ordinary course of plaintiff's business."

In support of this motion the Court's attention is respectfully directed to the supporting brief filed by the defendant.

/s/ ROBERT H. COWEN
United States Attorney

(3) District Court's Order in Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

[Caption Omitted]

United States of America filed a "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial" in this case. On the issues joined, the jury answered each of the interrogatories submitted to them favorably to plaintiff. With one exception, the charge given the jury was not objected to. That exception if well taken is harmless.

The jury determined the plaintiff had carried its burden of proof, hence the evidence is to be viewed in the light most favorable to plaintiff. If there is any basis for the jury's finding, the Court is bound by the verdict. *Scutilles* v.

Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L.Ed. 2d 142, 80 S. Ct. 173 (1959); *Richmond Television Corp. v. United States*, 354 F. 2d 410, 413 (4th Cir. 1965). No evidence was offered by defendant. The evidence and proper inferences to be drawn therefrom justify the verdict. The motion is therefore DENIED.

/s/ RICHARD B. KELLAM
Richard B. Kellam, Judge
United States District Court

Norfolk, Virginia
June 24th, 1969.

(4) Opinion of the Court of Appeals.

Before Bryan and Butzner, Circuit Judges, and Jones, District Judge.

Albert V. Bryan, Circuit Judge:

Deficiencies were assessed in Federal income taxes for 1963 and 1964 against The Business Development Corporation of North Carolina, and it sues to recapture the payment of these amounts, as permitted by 26 USC 7422(a). A jury had found a verdict favoring the taxpayer. The Government moved to set it aside and give a judgment non obstante dismissing the action. The District Court denied the request, but we think unadvisedly.

Business Development since April 1, 1956, the year of its organization, has been in business in North Carolina as a lender of funds to enterprises needing financial aid for expansion or desiring moneys to commence business operations. To qualify as a borrower, the taxpayer required the applicant to prove an unsuccessful attempt to procure the loan from customary banking institutions. Business Development's own capital came principally from North Carolina sources, designated as "members" of the corporation, and also from the Small Business Administration of the United States.

Section 166(c) of the Internal Revenue Code of 1954 permits the establishment of a bad debt reserve, as follows:

"*§ 166. Bad debts*

(a) General rule.—

(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

* * * *

(c) Reserve for bad debts.—In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts."

Availing itself of 166(c), Business Development between 1957 and 1959 deducted from its taxable income $72,751.08, creating a reserve. In 1960 the executive heads ordered additional deductions to raise the reserve to a sum equal to 5% of the taxpayer's outstanding loans. Like action in 1964 enlarged the account to 15%.

The Internal Revenue Commissioner's determination that the deductions through 1962 were sufficient to take care of estimated losses, and his refusal to permit the further deductions sought by the taxpayer under the increased percentages, amounting to $95,000.00 in 1963 and $120,000.00 in 1964, generated the reclamation of taxes now pressed. The Commissioner's defense is that the amount of any "deduction" for an "addition" to a reserve is left by the statute to his discretion, and that he has not in the circumstances of this case breached that trust.

The case went to the jury on special inquiries. The interrogatories with the answers were as follows:

"We, the jury, answer the following interrogatories as follows:

"Interrogatory Number 1:

"Was the Commissioner arbitrary in disallowing the claimed deduction of $95,000 for bad debt reserve

of The Business Development Corporation of North Carolina for the year 1963?

"Answer:
"Yes.

"Interrogatory Number 2:
"What would have been a reasonable addition to the reserves of The Business Development Corporation of North Carolina for the year 1963?

"Answer:
"95,000.

"Interrogatory Number 3:
"Was the Commissioner arbitrary in disallowing the claimed deduction of $120,000 for bad debt reserve of The Business Development Corporation of North Carolina for the year 1964?

"Answer:
"Yes.

"Interrogatory Number 4:
"What would have been a reasonable addition to the reserves of The Business Development Corporation of North Carolina for the year 1964?

"Answer:
"120,000."

In Smoot Sand & Gravel Corp. v. Commissioner, 274 F2d 495, 501 (4 Cir.), cert. denied 362 US 976 (1966), we said:

> "The purpose of the reserve is (1) to charge the loss against the period *in which it was actually incurred* as a result of the sale of goods to customers whose accounts subsequently prove to be uncollectible and (2) to show the estimated realizable value of the customers' accounts." (Accent added.)

Over the six years prior to 1963, Business Development's accumulated reserve came to $318,387.58 through average annual deductions of $53,064.60 for additions. In 1963, taxpayer suffered its first loss. It amounted to $28,037.72. Although at that time the reserve was adequate to absorb losses of 10 times that amount, the taxpayer deducted—and added—for the year 1963 $95,000.00.

By the end of 1964 Business Development had sustained an additional loss of $23,015.66. At that point its reserve was $385,349.86, but nevertheless it claimed a tax deduction-addition for that year of $120,000.00. This sum carried the reserve to $482,334.20 by the end of 1964, despite the only losses experienced through that period had been $51,053.38. Perfectly evident, then, was that the reserve of $318,387.55 at the beginning of 1963 was generously adequate without the additions asserted for 1963 and 1964.

Against these figures, the taxpayer, denying the two attempts as excessive, offered only opinion evidence of what sums should have been added in 1963 and 1964. Business Development had the two-fold burden, under section 166(c), of demonstrating that the proposed increments were "reasonable" and the Commissioner's refusal an abuse of discretion. Conceding arguendo that opinion evidence was admissible, we find it wholly failed to establish that the Commissioner was unreasonable or violated his discretion. See Patterson v. Pizitz, Inc., 353 F2d 267 (5 Cir. 1965), cert. denied 383 US 910 (1966).

The Government's motion was the equivalent of a request for a directed verdict. A direction should be granted where there is "no substantial evidence to support" the verdict asked of the jury. Hawkins v. Sims, 137 F2d 66, 67 (4 Cir. 1943). Furthermore, even though resolution of inferences must be left to the jury, nevertheless "it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Ford Motor

Co. v. McDavid, 259 F2d 261, 266 (4 Cir.), cert. denied 358 US 908 (1958). That is this case.

In our view judgment should have been entered for the Government on its motion.

Reversed.

(5) Judgment of the Court of Appeals.

[Caption Omitted]

APPEAL FROM the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

s/SAMUEL W. PHILLIPS, *Clerk*

Filed: June 24, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 735

THE BUSINESS DEVELOPMENT CORPORATION OF NORTH CAROLINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The the opinion of the court of appeals (Pet. App. 4a-8a) is reported at 428 F. 2d 451.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1970 (Pet. App. 8a). The petition for a writ of certiorari was filed on September 21, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case the Commissioner of Internal Revenue abused his discretion in disallowing tax deductions to petitioner for amounts added to its bad debt reserve for the years 1963 and 1964.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 166. Bad debts.

* * * *

(c) Reserve for bad debts.

In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts.

* * * *

Treasury Regulations on Income Tax (26 C.F.R.):

§ 1.166-4 *Reserve for bad debts.*

(a) *Allowance of deduction.* A taxpayer who has established the reserve method of treating bad debts and has maintained proper reserve accounts for bad debts or who, in accordance with paragraph (b) of § 1.166-1, adopts the reserve method of treating bad debts may deduct from gross income a reasonable addition to a reserve for bad debts in lieu of deducting specific bad debt items.

(b) *Reasonableness of addition to reserve*—(1) *Relevant factors.* What constitutes a reasonable addition to a reserve for bad debts shall be determined in the light of the facts existing at the close of the taxable year of the proposed addition. The reasonableness of the addition will vary as between classes of business and with conditions of business prosperity. It will depend primarily upon the total amount of debts outstanding as of the close of the taxable year, including those arising currently as well as those arising in prior taxable years, and the total amount of the existing reserve.

* * * *

STATEMENT

Petitioner is a North Carolina corporation organized in 1956, and since April 1 of that year has been in the business of making loans to various North Carolina enterprises. Prospective borrowers were required to show an unsuccessful attempt to obtain the loan from a conventional banking source before they could qualify for a loan from petitioner. (R. 17, 49.)[1]

For federal tax purposes, petitioner elected to deduct bad debts by the reserve method provided in Section 166(c) of the Code, and accordingly established a "bad debt" reserve to which annual deductions were charged. From 1956 to the end of 1962, petitioner had accumulated a bad debt reserve of $318,387.58, while sustaining no actual bad debt losses. During

[1] "R." references are to the record appendix and "Ex. Vol." references are to the exhibit volume filed in the court of appeals.

1963 and 1964, petitioner incurred its first actual bad debt losses in the total net amount of $51,053.38. For these same years petitioner sought deductions for additions to its bad debt reserve in the amount of $95,000 in 1963 and $120,000 in 1964. (R. 17.)

On audit, the Commissioner determined that the balance in the reserve account at the beginning of 1963 ($318,387.58), even when reduced by the actual losses sustained in 1963 and 1964, was sufficient as a reserve against losses which petitioner could reasonably expect to sustain with respect to its loans outstanding at the end of 1963 and 1964. The deductions claimed by petitioner for the additions to the reserve for those years were accordingly disallowed.

The jury, in answer to special interrogatories, responded that the Commissioner had been arbitrary in disallowing the proposed additions for the years 1963 and 1964 and that the additions for which petitioner claimed deductions were reasonable (Pet. App. 5a-6a; R. 152-153). The trial judge denied the government's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial (Pet. App. 3a-4a). On appeal the Fourth Circuit reversed, holding that petitioner's evidence "wholly failed to establish that the Commissioner was unreasonable or violated his discretion" (Pet. App. 4a-8a).

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions or other reason for further review.

1. Section 166(c) permits a taxpayer to deduct a "reasonable addition" to a reserve for bad debts in lieu of taking deductions for the debts which actually become worthless. The reserve method authorizes a deduction with respect to a taxable year for increases in the reserve necessary to provide for estimated future losses on the loans outstanding as of the close of that year, regardless of actual losses in that year. The reserve is reduced from time to time by actual losses, as they are incurred. By the express terms of the statute, the deduction for the reserve addition is allowed only in the discretion of the Commissioner.

The Regulations (Sec. 1.166-4(b)(1)) provide that the reasonableness of any proposed additions to a bad debt reserve depends primarily on the total loans outstanding as of the close of the year and the balance in the existing reserve. The balance in the existing reserve, of course, is the amount by which the bad debt deductions previously taken exceed the actual bad debt losses incurred.

The loans outstanding at the end of 1963 and [illegible] the years in question, totalled $9,332,073 and $9,552,759, respectively. During almost seven years of operations prior to 1963, petitioner sustained *no* actual bad debt losses. At the beginning of 1963, the existing reserve balance was $318,387.58. In 1963 and 1964 petitioner incurred its first actual bad debt losses, in the total net amount of $51,053.38. After reduction for the actual losses, the reserve balance as of the close of 1964 was $267,334.20, more than five times the actual losses incurred during nine years of operations and more than forty times the

average annual actual losses during this period. By the end of 1964 petitioner had been repaid some $9.3 million in loans; during its existence to that time total outstanding loans did not exceed $9.6 million (R. 19, 57; Ex. 12, Ex. Vol.).[2] In these circumstances, the Commissioner correctly disallowed the claimed tax deductions for additions to the reserve in 1963 and 1964 and plainly did not abuse his discretion in doing so.[3]

2. Petitioner contends (Pet. 7-10, 19-20) that, in determining whether the claimed reserve additions were "reasonable," the court of appeals employed improper standards and decided this issue in conflict with *Rhode Island Hospital Trust Co.* v. *Commissioner*, 29 F.2d 339 (C.A. 1). While petitioner correctly states that many factors are to be considered in determining whether a bad debt reserve addition is reasonable, the Commissioner did, in fact, consider the factors to which the Regulations attach primary importance—total loans outstanding and existing reserve balance—along with petitioner's actual loss his-

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[2] Contrary to petitioner's contention (Pet. 20), one complete cycle of loans thus had almost been completed.

[3] Petitioner complains (Pet. 6, 17-19) that its reserve balance, without the additions claimed for 1963 and 1964, was only 3.1 percent and 2.8 percent of its outstanding loans at the close of the respective years. We note that petitioner's average annual ratio of actual bad debt losses to outstanding loans at the close of each year during the twelve years of operations completed at the time of trial was approximately .05 percent (R. 17, 19). The obvious leeway thus present in the reserve, without the claimed additions, fully supports the Commissioner's disallowance.

tory.[4] These are the very factors which petitioner's authorities say must be considered.

Petitioner apparently overlooks that *Rhode Island* turned on the particular factual setting in which it arose, and which, on analysis, is readily distinguishable from the present case. There the court placed great emphasis on the unusual economic conditions existing at the time and stated that such called for "unusual measures" and justified a departure from actual loss experience in determining a reasonable reserve addition for the year in question. No such similar circumstances exist with respect to the case at bar.

3. Petitioner further contends (a) that the diversity of the court decisions dealing with deductions allowable for additions to bad debt reserves renders Section 166(c) meaningless (Pet. 10), and (b) that the Commissioner applied a "double standard" in denying the deductions here claimed (Pet. 17). In so doing petitioner fails to recognize that it had the burden of proving, by facts relevant to its own loan

[4] The taxpayer's actual bad debt loss experience is of vital importance in determining the propriety of deductions claimed for additions to a bad debt reserve. See *United States* v. *Haskel Engineering & Supply Co.*, 380 F. 2d 786 (C.A. 9); *Patterson* v. *Pizitz, Inc.*, 353 F. 2d 267 (C.A. 5), certiorari denied, 383 U.S. 910; *Massachusetts Business Development Corp.* v. *Commissioner*, 52 T.C. 946. We also note that for taxable years beginning after July 11, 1969, Congress has adopted the actual loss experience test for Small Business Investment Companies and business development corporations (such as petitioner). Section 586 of the Code, added by the Tax Reform Act of 1969, restricts bad debt reserve additions, and thus tax deductions based thereon, essentially to the amount called for by actual loss experience.

portfolio, that the Commissioner abused his discretion in denying the claimed deductions because petitioner's existing reserve was sufficient to absorb prospective losses with respect to its outstanding loans. Of course, the essentially factual nature of the Commissioner's determination can be expected to result, and has in fact resulted, in decisions which can only be reconciled on the basis of the peculiar circumstances on which they are grounded. But certainly this does not make the statute, or the test applied thereunder, "meaningless." Petitioner's reliance on revenue rulings issued with respect to other taxpayers in other circumstances is similarly misplaced.[5]

4. The petition asserts (Pet. 14) that the court of appeals decision deprived petitioner of its Seventh Amendment right to jury trial. But petitioner failed to carry its burden of demonstrating an abuse of dis-

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[5] Petitioner challenges (Pet. 20) the Commissioner's disallowance here as inconsistent with his treatment of other taxpayers. The short answer is that the Commissioner is not required to treat petitioner in the same fashion he has treated other types of taxpayers in differing circumstances.

Thus in Revenue Ruling 65-92, 1965-1 Cum. Bull. 112, the Service sought to minimize the existing large variations in permissible reserves of banks. It referred to special circumstances in the banking industry, and specifically stated that the method would not be used as a precedent for determining reasonable additions to reserves for bad debts for taxpayers other than banks.

Rev. Rul. 64-48, 1964-1 Cum. Bull. (Part 1) 104, dealing with Small Business Investment Companies, is likewise inapplicable. It was issued in the absence of any loss experience by SBIC's and provides no guidance for petitioner, which is not SBIC and has an actual loss experience. See *Massachusetts Business Development Corp., supra.*

cretion by the Commissioner. The "expert" opinion evidence proffered by petitioner did not go to the pivotal question of what losses could be reasonably anticipated with respect to petitioner's outstanding loans as of the close of 1963 and 1964. As the court of appeals found, there was no substantial evidence to support the jury's finding of abuse of discretion, because the inference necessary to support this conclusion was, from the facts petitioner presented, so tenuous as to rest merely on speculation and conjecture (Pet. App. 7a-8a). In making this determination the court applied the correct standard of appellate review and petitioner's challenge is without merit. *Manaia* v. *Potomac Electric Power Co.*, 268 F.2d 793, 798-799 (C.A. 4), certiorari denied, 361 U.S. 913.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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OCTOBER 1970.

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